

# NOTES

## Leaving Well Enough Alone—Why the “Would Have” Standard Works Well for Determining Pretext Stops in Washington State: A Critical Analysis of the *Whren* Decision

*Kelly Montgomery\**

### I. INTRODUCTION

In the spring of 1995, Tony, a senior at Seattle University, was required to take a “ride-along” for his Police and Community class. Tony chose to take his ride-along with the King County Police Department.<sup>1</sup>

It was Saturday night, about 10:30 p.m. Tony and the police officer were traveling down Pacific Highway South when they spotted a dirty Dodge Dart with expired tabs. The officer turned on his flashing lights, and pulled over the Dodge. The police officer shined his vehicle spotlight on the car. Upon illumination, the officer realized an older woman was driving. He said, under his breath, “Darn, it’s a chick.” He went up to the car, told the woman to get current tabs, and let her drive away.

What if the driver had not been a chick? What if the driver had been a young, black male? At the time, Tony questioned the significance of the officer’s words. He was left with the feeling that, if the officer had known the driver was an older woman, he would have

---

\* B.A., Criminal Justice, Seattle University 1995; J.D. Candidate, Seattle University School of Law, 1998. The author wishes to thank Professor Susan McClellan; Professor John LaFond; Roxanna G. Fowler, D.C., C.S.S.T., for her input, patience, and advice; Paul Jon Ruuska, J.D.; Judge Duncan Bonjorn; Marc A. Marquis; Kelly G. Blazy; Dominiqué L. Jinhong; and James E. Marner, J.D. The author wishes to especially acknowledge and thank Julie Anne Tyrian for her gentle prodding and support.

1. The following is a scenario that occurred between the author and a King County Police officer during a ride-along in Federal Way, Washington.

never stopped her. His comment, "Darn, it's a chick," made Tony wonder if the police officer would only pull over a potential score—something more exciting than the mundane, run of the mill, expired tabs infraction.

As the above scenario illustrates, police officers have considerable discretion over whom they will stop for a traffic violation. In June 1996, the United States Supreme Court, in *Whren v. United States*, handed down a ruling that could allow police to exercise nearly limitless discretion.<sup>2</sup> The *Whren* decision effectively overruled the pretext stop doctrine under traditional Fourth Amendment analysis.<sup>3</sup> Under the *Whren* holding, the constitutional standard for a police traffic stop is whether the officer "could have" made the stop, based only on whether the officer had probable cause to believe a traffic infraction occurred.<sup>4</sup>

Consider the introductory scenario and substitute a young, long-haired, white male for the older woman. Suppose the officer was a plainclothes narcotics officer, who saw this young male driving his Dodge Dart with expired tabs. Suppose also that this youth fit the King County police department's "drug-image" profile. If the narcotics officer pulled him over, looking for drugs under the guise of expired tabs, would it have been a legal stop? If the narcotics officer found drugs, would they have been admissible at trial?

Under the *Whren* decision, this stop would have been constitutional, because the officer had some form of probable cause: the youth was driving with expired tabs.<sup>5</sup> It would not have mattered that the narcotics officer was not a traffic officer, that is, one who normally enforces traffic infractions. It would not have mattered if the narcotics officer had not even seen the expired tabs. It would not have mattered that a traffic officer in a similar situation would normally not have stopped an individual for that minor violation. As long as the narcotics officer could point to probable cause of any kind, the stop would be constitutional under the *Whren* decision.<sup>6</sup>

In Washington state, however, such a "pretext" stop would not be permissible. Washington courts consider this stop a "pretext" because a reasonable plainclothes narcotics officer would not normally

---

2. See *Whren v. United States*, 116 S. Ct. 1769 (1996) (holding that the "could have" standard applies to determine whether a stop is pretextual under the Fourth Amendment of the United States Constitution).

3. *Id.*

4. See *id.* at 1772.

5. See *id.*

6. See *id.*

concern him or herself with ordinary traffic stops.<sup>7</sup> Washington courts use the “would have” standard to determine whether a stop is pretextual.<sup>8</sup> Under this standard, the courts first determine whether the officer had probable cause to believe that a traffic infraction occurred, and second, whether a reasonable officer, acting under the same circumstances, “would have” made the stop.<sup>9</sup> Because a reasonable narcotics officer would probably not make an ordinary traffic stop, pulling the youth over because he was driving with expired tabs would probably be a pretext stop. Such a stop would not be permissible under Washington law.<sup>10</sup>

This Note argues that the “could have” standard makes a mockery of the probable cause protections provided by the Fourth Amendment and that the Washington courts should not adopt that standard. Instead, because Washington courts have traditionally held that Article 1, Section 7, of the Washington Constitution provides broader protection than the Fourth Amendment of the Federal Constitution, the Washington courts should continue to use the “would have” standard to determine whether a stop is pretextual under Article 1, Section 7.<sup>11</sup>

Part II of this Note briefly describes the applicable search and seizure doctrine and tracks the split in the federal circuits regarding which standard is appropriate for the courts to apply in determining whether a pretext stop has occurred. Specifically, this section will

---

7. See *State v. Chapin*, 75 Wash. App. 460, 468, 879 P.2d 300, 305 (1994) (holding that a pretext stop is governed by the “would have” standard: whether a reasonable officer “would have” made the stop absent an improper motive and whether the officer was following regular police procedures).

8. See *id.*

9. *Id.*

10. See *id.*

11. I have limited the scope of this Note to the pretext stop doctrine as it applies to traffic stops. This Note considers the *Whren* decision and whether an independent state constitutional analysis indicates that Article 1, Section 7, of the Washington State Constitution provides broader protection than the Fourth Amendment. For extensive history and background on pretext stops, see generally John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REFORM 523 (1984); Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1 (1990); Laurie A. Buckenberger, Note, *Criminal Procedure: Pretextual Arrests: In United States v. Scopo the Second Circuit Raises the Price of a Traffic Ticket (Considerably)*, 61 BROOK L. REV. 453 (1995); Scott Campbell, Comment, *United States v. Ferguson: The Sixth Circuit Adds a Third Test for Pretextual Police Conduct*, 56 OHIO ST. L.J. 277 (1995); Matthew S. Crider, Note, *Criminal Procedure - Searches and Seizures - Police Officers Must Meet "Reasonable Officer" Standard to Withstand Pretext Claim*, *State v. Haskell*, 645 A.2d 619 (Me. 1994), 36 S. TEX. L. REV. 629 (1995).

compare the strengths and flaws of three standards: (1) the subjective, (2) the "could have," and (3) the "would have."

Part III of this Note introduces the *Whren* case and analyzes the unanimous opinion, authored by Justice Scalia. This section contrasts Justice Scalia's reasoning and conclusions with those of Washington State courts and various commentators.

Part IV shifts focus and undertakes an independent state constitutional analysis by applying the six nonexclusive *Gunwall* factors.<sup>12</sup> Application of the *Gunwall* factors indicates whether the Washington State Constitution provides broader protection than does the Fourth Amendment. Next, this section analyzes the facts of *Whren* under Washington State law to determine whether Washington courts would have decided *Whren* differently under Article 1, Section 7, of the State Constitution.

This Note concludes that, while the *Whren* decision textually meets the Fourth Amendment requirements, it tramples on the spirit of the U.S. Constitution in two ways. First, the *Whren* decision makes a mockery of the probable cause protections of the Fourth Amendment. Second, it effectively discards any meaningful pretext stop doctrine, thus giving police officers nearly unbridled discretion to conduct pretext stops. As such, Washington courts should enforce a pretext doctrine with bite by continuing to apply the "would have" standard.

## II. SEARCH & SEIZURE PRINCIPLES

The Fourth Amendment to the U.S. Constitution has two equally important parts. The first part of the amendment protects people from unreasonable searches and seizures, while the second part establishes the probable cause requirement for the issuance of warrants.<sup>13</sup> Fourth Amendment protections are triggered only when police action rises to

---

12. *State v. Gunwall*, 106 Wash. 2d 54, 58, 720 P.2d 808, 811 (1986).

13. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. For an interesting and succinct history of the Fourth Amendment and search and seizure generally, see Alexander E. Eisemann, Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B. U. L. REV. 223, 226 (1983). See also, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

the level of a search or seizure and when the police conduct is unreasonable.<sup>14</sup> To determine whether police conduct has violated the Fourth Amendment, the courts apply an objective test that considers the officer's conduct under the totality of the circumstances.<sup>15</sup> This objective standard is a balancing test that requires the court to weigh the level of intrusion into a person's privacy against the "promotion of legitimate governmental interests."<sup>16</sup>

The second part of the Fourth Amendment identifies the probable cause requirement.<sup>17</sup> Generally, the police are required to have a warrant based upon probable cause to arrest someone or to search their person, home, or belongings.<sup>18</sup> Probable cause to arrest requires that the totality of circumstances apparent to the police officer must be such that a reasonable person could conclude that the particular individual has committed a crime.<sup>19</sup> Probable cause to search also contains a temporal limitation and requires that the items sought are reasonably likely to be found at the place to be searched.<sup>20</sup> Many arrests and searches, however, are conducted without a warrant, since there are numerous exceptions to the warrant requirement.<sup>21</sup> But, even without a warrant, the officer must have probable cause to conduct the search or to make the arrest.<sup>22</sup> In most cases, it is the officer who makes the initial determination that probable cause exists, but subject to review by a magistrate at a later time.<sup>23</sup>

An officer's actions may amount to something less than a full-blown search or arrest.<sup>24</sup> Stop-and-frisk actions are less intrusive to a person than a full-blown search or arrest.<sup>25</sup> Therefore, an officer need not have probable cause to conduct a stop-and-frisk. The officer must, however, be able to point to specific and articulable facts, based

---

14. See, e.g., *State v. Thorn*, 129 Wash. 2d 347, 350, 917 P.2d 108, 111 (1996) (stating Fourth Amendment protects against unreasonable search or seizure).

15. See *Maryland v. Macon*, 472 U.S. 463, 470 (1985).

16. See *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

17. See U.S. CONST. amend. IV.

18. See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (holding, *inter alia*, that probable cause is necessary in order to arrest with or without a warrant).

19. See *id.*

20. See *Marron v. United States*, 275 U.S. 192, 199 (1927).

21. See, e.g., *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (listing and describing some of the numerous exceptions). The numerous exceptions to the warrant requirement are beyond the scope of this Note.

22. See *United States v. Watson*, 423 U.S. 411, 421 (1976).

23. *Id.* at 423.

24. See *Terry v. Ohio*, 392 U.S. 1 (1968).

25. See *id.* at 16-20.

on the totality of the circumstances, that indicate the person is committing a crime.<sup>26</sup>

When a police officer stops and detains an individual for a traffic violation, it is a seizure under the Fourth Amendment.<sup>27</sup> Although the detention may be brief, and the purpose of the stop narrowly focused, the officer must at least have specific and articulable facts that support the stop.<sup>28</sup> The police officer will normally have more than an articulable suspicion that a traffic infraction has occurred because the police officer usually has seen the infraction, which amounts to probable cause for the stop. Ironically, it is the probable cause that provides the mechanism that gives rise to the whole doctrine of pretext stops, because lawful pretext stops are based on probable cause.

### A. *Pretext Stops*

There are two types of pretext stops—lawful pretext stops based on probable cause and fabricated pretext stops which are not based on probable cause.<sup>29</sup> A lawful pretext stop occurs when the police officer has probable cause for a minor offense. The officer may stop a person based on the minor offense to inquire or investigate a major offense for which there is no probable cause.<sup>30</sup> Thus, if an officer possesses probable cause that a traffic infraction has occurred, the officer has legal justification to issue a citation, to arrest, or to search—no matter how minor the traffic infraction is.<sup>31</sup>

A good example of a “lawful” pretext stop is the introductory scenario. Upon noticing expired tabs, the officer pulls over the driver. The officer may have a hunch, but no articulable suspicion or probable cause that the driver has drugs on his person or in his car, but the officer can use the expired tabs as a pretext to try to discover if in fact there are drugs. Before the *Whren* decision, a lawful pretext stop of

---

26. See *id.* at 20-27.

27. See *Prouse*, 440 U.S. at 653.

28. See *Terry*, 392 U.S. at 21 (holding that in order to stop and frisk a person, the police officer need not have probable cause, but must articulate more than a hunch, i.e., “articulable suspicion”).

29. See Wayne R. LaFare, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rule and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 502 (1990); Butterfoss, *Solving the Pretext Puzzle*, *supra* note 11.

30. See *U.S. v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988) (after discussing the various tests used to determine whether a stop is a pretext, the *Guzman* court held that the “would have standard” is the “better test”).

31. See, e.g., *State v. Chapin*, 75 Wash. App. 460, 465 n.9, 879 P.2d 300, 303 n.9 (1994) (acknowledging that in Washington State the normal practice following a minor traffic infraction is for the police to issue a citation; therefore, it is generally inappropriate for a police officer to arrest a driver following a traffic infraction). See also WASH. REV. CODE § 46.64.015 (1996).

this nature would be impermissible in Washington state.<sup>32</sup> Under *Whren*, however, this stop would be allowed because the officer had probable cause—the driver's expired tabs.<sup>33</sup>

The second type of pretext stop occurs when the police officer falsifies or fabricates probable cause.<sup>34</sup> This is known as a "fabricated" pretext stop.<sup>35</sup> This type of pretext stop is clearly unconstitutional, because the officer does not have any basis for the stop except for a hunch that the driver is engaged in some type of illegal activity.<sup>36</sup>

An example of a fabricated pretext stop was presented in a recent exposé on the Dateline NBC television news program.<sup>37</sup> The exposé focused on the disturbing practice of Louisiana police officers who fabricate minor traffic infractions to pull over drivers with out-of-state license plates who fit a drug-courier profile.<sup>38</sup> The officers drive behind an out-of-state car, follow them for a distance, and pull them over for a purported minor infraction such as weaving or speeding up and slowing down.<sup>39</sup> Because of the fabricated probable cause, the officers assert lawful justification to search and seize the vehicle and the contents of the vehicle, arrest the driver, or detain them in jail.<sup>40</sup> In some cases, drivers who cannot hire a lawyer have actually lost their vehicles.<sup>41</sup>

To expose the Louisiana police practices, the producers hid five cameras inside a car with out-of-state plates, in order to show the vehicle from all angles, and then set the cruise control at a few miles under the speed limit.<sup>42</sup> Soon, a Louisiana police officer pulled behind the car, followed it for several miles, and finally stopped it for "speeding up and slowing down" repeatedly.<sup>43</sup> The hidden cameras inside the vehicle revealed that the speed of the car had not varied. The officer approached the vehicle, ordered the driver and passenger

---

32. See *Chapin*, 75 Wash. App. at 468, 879 P.2d at 305.

33. See *Whren*, 116 S. Ct. at 1776.

34. See generally Butterfoss, *Solving the Pretext Puzzle*, *supra* note 11.

35. See *id.*

36. See *id.*

37. The Dateline NBC transcript, January 3, 1997, is on file at the *Seattle University Law Review*.

38. See *id.* at 3.

39. See *id.* at 5-6.

40. See *id.* at 4.

41. See *id.* at 12. The exposé also unearthed the egregious fact that the particular police departments received a cut from the proceeds of their seizures, money that the officers used for ski trips to Colorado, clothing, meals, and other trivialities. See *id.* at 14-15.

42. See *id.* at 5.

43. See *id.* at 6.

out of the car, and questioned them before allowing them to leave.<sup>44</sup> The exposé revealed the inherent problem in either lawful or fabricated pretext stops: "The true evil of the pretext case is the virtually unlimited authority of the police officer to arrest and search based on minor offenses."<sup>45</sup>

To determine if a pretext stop has occurred, the courts have applied three standards: (1) subjective, (2) "could have," or (3) "would have." Whether legal or fabricated pretext, the underlying issue of which standard to apply centers on how much authority a police officer should have. The issue and debate over which of the standards best establishes pretext has been hotly debated for some time by judges and commentators and among the federal circuits.<sup>46</sup>

### B. The Subjective Standard

The subjective standard focuses on the primary purpose of the arresting officer in making the stop.<sup>47</sup> This focus requires the courts to determine the police officer's motivation in making the stop.<sup>48</sup> If the court finds that the motivation was improper, then the stop is unconstitutional and the evidence inadmissible.<sup>49</sup>

In 1994, the Ninth Circuit rejected the subjective standard.<sup>50</sup> The court stated that a subjective standard is ineffective, emphasizing the futility of inquiring into an officer's subjective state of mind.<sup>51</sup> Thus, the subjective standard was put to rest, with no federal circuits now using it to determine whether a stop is a pretext.<sup>52</sup> With the demise of the subjective standard, the circuits have split over two variations of an objective standard: the "could have" and the "would have" standard.

---

44. See *id.*

45. Butterfoss, *Solving the Pretext Puzzle*, *supra* note 11, at 59.

46. See generally *id.* at 2-28.

47. See *U.S. v. Smith*, 802 F.2d 1119, 1123 (9th Cir. 1986) (referring to the police officer's probable cause, and that the search of the defendant was incident to a lawful arrest, not an improper motivation—ergo, no pretext).

48. *Id.* at 1124.

49. See *id.*

50. See *U.S. v. Cannon*, 29 F.3d 472, 475-476 (9th Cir. 1994) (holding that the previous holdings of the Ninth Circuit are consistent with the "would have" standard used by the Tenth and Eleventh Circuits).

51. See *id.* at 476.

52. See *id.*



### C. The "Could Have" Standard

The "could have" standard is also known as the "pure objective" test.<sup>53</sup> The court's focus under this standard is whether the arresting officer had probable cause to believe that the defendant committed a traffic offense and whether the local law authorizes a stop for such an offense.<sup>54</sup> The key under the "could have" standard is probable cause.<sup>55</sup> If the officer has probable cause to believe that a crime is or is likely to be committed, he or she absolutely "could have" made the stop.<sup>56</sup> Thus, no pretext exists.

A good example of the courts' regard for the "could have" standard is *U.S. v. Causey*.<sup>57</sup> In *Causey*, the Fifth Circuit abandoned the subjective standard, holding that "so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry."<sup>58</sup>

In *Causey*, Louisiana police officers received an anonymous tip that the defendant had robbed a bank in Baton Rouge.<sup>59</sup> The police discovered an old warrant on a petty theft charge, arrested the defendant, interrogated him, called the FBI, and eventually obtained a voluntary confession for the Baton Rouge bank robbery.<sup>60</sup>

During the pre-trial motions, one police officer testified that the only reason for arresting the defendant on the old warrant was to investigate the robbery.<sup>61</sup> Nonetheless, the court found that, because the officers had a valid warrant, they "took no action that they were not legally authorized to take," and nothing "improper occur[ed]."<sup>62</sup> Probable cause had allowed a magistrate to issue the old warrant.<sup>63</sup> Because of that warrant, the officer technically "could have" made the arrest.<sup>64</sup> Therefore, there was no pretext. As the *Causey* court demonstrates, under the "could have" standard, the officer's improper motives are immaterial.<sup>65</sup>

---

53. See *State v. Chapin*, 75 Wash. App. 460, 466, 879 P.2d 300, 304 (1994).

54. See *U.S. v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989).

55. See *Whren*, 116 S. Ct. at 1772.

56. See *id.*

57. *U.S. v. Causey*, 834 F.2d 1179 (5th Cir. 1987).

58. See *id.* at 1184.

59. See *id.* at 1180.

60. See *id.*

61. See *id.*

62. *Id.* at 1180-81.

63. See U.S. CONST. amend. IV.

64. See *Causey*, 834 F.2d at 1181.

65. See *id.* at 1183.

The most cogent argument for following the "could have" standard is that it fits within the textual guidelines of the Fourth Amendment.<sup>66</sup> The Fourth Amendment requires a warrant based on probable cause.<sup>67</sup> If an officer has probable cause and can point to facts and circumstances that would lead a reasonable person to believe that a particular individual has committed a crime, the Fourth Amendment requirement has been satisfied.<sup>68</sup>

However, the "could have" standard illustrates the paper-thin shield that the Fourth Amendment places between citizens and police officers. If the police have probable cause, then the probable cause itself acts as a gate to close off the other protections of the Fourth Amendment. The Fourth Amendment shield is paper-thin because probable cause exists to guarantee that citizens have sufficient protection against unfettered police discretion.<sup>69</sup> Thus, when the police have probable cause, textually the Fourth Amendment's purposes have been served.

However, under the "could have" standard, probable cause plays a very different role: it no longer acts as a protection *against* unfettered police discretion; instead, it acts as a vehicle *for* unfettered police discretion, while simultaneously shutting off access to other Fourth Amendment protections. If an officer can point to probable cause of *any* type, in either a lawful or fabricated pretext stop, the purpose and protection of the Fourth Amendment are shut off. Thus, the "could have" standard's reliance on probable cause is artificial at best.<sup>70</sup>

Kamisar, LaFave, and Israel have noted that since the advent of the "war against drugs," state troopers are always conscious of suspicious-looking travelers on the interstate highways.<sup>71</sup> In a case they cited in support of this statement, a state trooper noticed a van with black occupants inside. The trooper drove passed the van, came to the top of a hill, pulled to the shoulder, and turned off his headlights. The van crested the hill, the driver noticed the car on the shoulder, and changed lanes. The trooper pulled over the van for an illegal lane change, and the court upheld the charge.<sup>72</sup> The authors concluded that "illustrations from the many reported cases [of minor

---

66. See U.S. CONST. amend. IV.

67. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

68. See *id.*

69. See generally *Illinois v. Gates*, 462 U.S. 213 (1983) (Fourth Amendment protects by not allowing complete police discretion).

70. See YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 24 (Supp. 1996).

71. See *id.*

72. See *United States v. Roberson*, 6 F.3d 1088, 1089 (5th Cir. 1993), cited in *id.*

traffic infractions] reveal how little it takes to supply grounds for a traffic stop [that are] acceptable to the courts."<sup>73</sup>

This example pinpoints the overriding problem with the "could have" standard. From a textualist view, there can be no "fabricated" pretext stop because the officers can always fulfill the textual probable cause requirement of the Fourth Amendment.<sup>74</sup> However, from an originalist view, the framers of the Bill of Rights, who were generally distrustful of unchecked government power,<sup>75</sup> in all likelihood did not envision the probable cause requirement as a double-edged sword, where one edge provides the means for a pretext stop, while the other edge sharply cuts off access to the very protection originally contemplated by the probable cause requirement. The "could have" standard thus tramples on the spirit of the Fourth Amendment because the framers certainly envisioned the probable cause requirement as a check on police discretion, and not as a vehicle for the exercise of unbridled police discretion.<sup>76</sup>

#### D. The "Would Have" Standard

The courts that do not follow the "could have" standard follow another version of an objective test—the "would have" standard. The "would have" standard focuses on whether an officer has the requisite probable cause or reasonable suspicion to justify the stop and whether the officer was conforming with regular police procedures when making the stop.<sup>77</sup> This differs from the "could have" standard, because under the "could have" standard, the existence of probable cause ends the inquiry.<sup>78</sup>

The Ninth Circuit adopted the "would have" standard in *U.S. v. Cannon*.<sup>79</sup> In *Cannon*, the police officers had a search warrant for a defendant who could only be served during daytime hours.<sup>80</sup> The police learned through an informant where the defendant's car was parked.<sup>81</sup> Since the police officers knew the defendant did not have a valid driver's license, they had a uniformed police officer determine

---

73. See KAMISAR ET AL., *supra* note 70, at 25.

74. See *Whren*, 116 S. Ct. 1769 (1996).

75. See THE FEDERALIST, NO. 51 (James Madison), NO. 84 (Alexander Hamilton).

76. See LaFave, *Controlling Discretion by Administrative Regulations*, *supra* note 29.

77. See *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988).

78. See *Whren*, 116 S. Ct. at 1777.

79. 29 F.3d 472 (9th Cir. 1994).

80. See *id.* at 474.

81. See *id.* at 473

when the defendant was driving the car and then stop the defendant for a suspended license.<sup>82</sup>

The uniformed officer stopped the defendant, received permission to search the car, found \$16,000 in the trunk, and radioed for the other officers who were nearby.<sup>83</sup> Upon arrival at the scene, those officers found cocaine residue and arrested the defendant.<sup>84</sup> Because of the evidence found through the suspended license infraction, the officers received authorization to execute the search warrant during the nighttime hours,<sup>85</sup> and found further incriminating evidence.<sup>86</sup>

During trial, the defendant argued that the proper standard to determine whether a stop was pretextual was the subjective standard.<sup>87</sup> The Ninth Circuit, finding the subjective standard "ineffective," held that its previous decisions were consistent with the "would have" standard.<sup>88</sup> By adopting this standard, the Ninth Circuit aligned itself with the Tenth and Eleventh circuits in framing the inquiry as "whether a reasonable police officer would have stopped the defendant for the traffic violation, absent his unrelated suspicions. . . ."<sup>89</sup>

Thus, although all of the circuits have affirmatively rejected the subjective standard, there remains a split in the circuits on which objective standard is more appropriate.<sup>90</sup> While many circuits follow the "could have" standard, other circuits properly require more than mere technical, textual compliance with the Fourth Amendment mandate for probable cause. These circuits require not only probable

---

82. *See id.* at 474.

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.* at 475.

88. *See id.* at 476.

89. *Id.*

90. The 8-3 split among the circuits:

Those following the "could have" standard: Second Circuit (*United States v. Scopo*, 19 F.3d 777 (2nd Cir. 1994)); Third Circuit (*United States v. Hawkins*, 811 F.2d 210 (3rd Cir. 1987)); Fourth Circuit (*United States v. Hassan El*, 5 F.3d 726 (4th Cir. 1993)); Fifth Circuit (*United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987)); Sixth Circuit (*United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993)); Seventh Circuit (*United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989)); Eighth Circuit (*United States v. Cummins*, 920 F.2d 498 (8th Cir. 1990)); and D.C. Circuit (*United States v. Whren*, 53 F.3d 371 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 1769 (1996)).

Those following the "would have" standard: Ninth Circuit (*United States v. Cannon*, 29 F.3d 472 (9th Cir. 1994)); Tenth Circuit (*U.S. v. Guzman*, 864 F.2d 1512 (10th Cir. 1988)); and Eleventh Circuit (*U.S. v. Smith*, 799 F.2d 704 (11th Cir. 1986)).

cause but also satisfaction of the reasonable officer test, the "would have" standard.<sup>91</sup>

Although the "would have" standard complies with the spirit of the Fourth Amendment, it is also problematic. The "would have" standard requires probable cause, but it goes one step further, asking whether a reasonable police officer "would have" made the stop.<sup>92</sup> Arguably, this double inquiry goes beyond the minimal Fourth Amendment requirement of probable cause, and thus affords more protection than required by the Fourth Amendment.<sup>93</sup>

Also, because additional focus is placed on the reasonable police officer complying with regular police procedures, a second flaw is evident: acting reasonably is defined as compliance with regular police procedures. Because regular police procedures vary widely among jurisdictions, the reasonable police officer in Denver or Washington, D.C. may not be the reasonable police officer in Seattle, Memphis, or Miami. Thus, to determine what a reasonable officer "would have" done necessitates either a national uniformity in police procedures, or that the reasonable officer will vary from state to state.<sup>94</sup> This is why it is important to conduct an independent state constitutional analysis in the area of pretext stops. The privacy expectations of Washington citizens and the practices of Washington police officers are different from the privacy expectations and police practices of other states.<sup>95</sup>

While the "would have" standard is problematic, it provides for a pretext doctrine with a bite. The "could have" standard effectively eliminates any need for pretext analysis. Now, under *Whren*, there no longer exists a "legal" pretext doctrine in federal courts.<sup>96</sup> Consequently, the only relief from pretext stops for the citizens of Washington state rests with state courts under the State Constitution, under which the citizens of Washington state have broader protection than provided under the Fourth Amendment and the *Whren* decision.

---

91. See *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988) (holding that the subjective intent of the officer in making a traffic stop is immaterial, and that the "could have" standard is not determinative; the "better test" is the "would have" standard).

92. See *State v. Chapin*, 75 Wash. App. 460, 468, 879 P.2d 300, 305 (1996).

93. See *Whren*, 116 S. Ct. at 1772.

94. See *Gunwall*, 106 Wash. 2d at 58, 720 P.2d at 811.

95. See *id.*

96. 116 S. Ct. 1769.

### III. THE *WHREN* CASE

#### A. *The Facts*

On June 13, 1993, two young black males, in a dark Nissan Pathfinder with temporary license tags, stopped at a stop sign. Plainclothes officers of the Washington, D.C., Metropolitan Police Department, patrolling a "high drug area" in an unmarked car with the intent of finding narcotics activity,<sup>97</sup> passed the Pathfinder, saw the defendants inside, and noticed that the driver was looking down into the lap of the front seat passenger.<sup>98</sup> One officer later stated that the driver was "not paying full time and attention to his driving,"<sup>99</sup> and that the Pathfinder remained stopped at the stop sign for "what seemed to be an unusually long period of time—more than 20 seconds."<sup>100</sup> Although the Pathfinder was stopped for more than 20 seconds, the officer testified that the vehicle behind the Pathfinder did not honk or "otherwise request the Pathfinder to move."<sup>101</sup> When the officers turned around to "'investigate'—to inquire of the driver 'why did he stay at the stop sign for so long length [sic] of a time,'"<sup>102</sup> the Pathfinder turned right without signaling, and "spe[d] off quickly towards Minnesota Avenue."<sup>103</sup> The officers followed the Pathfinder until it stopped at a red light,<sup>104</sup> where the officers blocked it with their vehicle.<sup>105</sup> As Officer Soto approached the Pathfinder, he observed what appeared to be two large bags of crack cocaine in the passenger's hands.<sup>106</sup> The passenger of the Pathfinder was Michael

---

97. See *U.S. v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 1769 (1996).

98. See *id.* at 373.

99. Brief for Petitioner at 4, *Whren*, 116 S. Ct. 1769 (1996) (No. 95-5891). For U.S. Supreme Court briefs, see: 1996 WL 75758 (Pet. Brief); 1996 WL 115816 (Resp. Brief); 1996 WL 164375 (Reply Brief).

100. Brief for Petitioner at 5, *Whren* (No. 95-5891).

101. *Id.*

102. *Id.*

103. *Id.* at 5-6. When asked if the driver signaled, Officer Littlejohn stated, "it used no hand or mechanical turn signals at all that I can remember." When asked if the Pathfinder was conforming with the speed limit in that area, Officer Littlejohn testified, "it was my opinion that it was unreasonable speed."

104. See *id.* at 7.

105. *Id.* at 8.

106. See *id.* At the suppression hearing, there was conflicting testimony from Officer Littlejohn and Officer Soto regarding the number of bags that defendant Whren was holding. Officer Littlejohn testified that the defendant was "holding only one bag of cocaine, which he was displaying to Brown with his right hand while his left hand rested on his lap." Officer Soto testified that the defendant was holding a plastic bag of cocaine in each hand. Officer Littlejohn testified that both he and Officer Soto were standing in positions such that they enjoyed the same

Whren. He and the driver, James Brown, were arrested. The search of the vehicle netted illegal drugs.<sup>107</sup> Michael Whren and James Brown were indicted on charged four counts, which included federal offenses.<sup>108</sup>

### B. The District Court

Both Whren and Brown moved, in a pretrial hearing, to suppress the evidence found in the Pathfinder, because it was the result of an illegal pretext search.<sup>109</sup> At the pretrial hearing, Officer Soto testified that his intent in approaching the Pathfinder was two-fold: he wanted to ask why Brown had stopped so long at the stop sign, and why Brown was speeding.<sup>110</sup> The officer also stated that he did not intend to issue Brown a ticket.<sup>111</sup> However, the defendants argued that the plainclothes officers did not have probable cause to believe that drug-type activities were going on, nor did they have reasonable suspicion of drug activity.<sup>112</sup> Therefore, Officer Soto's approaching the Pathfinder to give a warning was a mere pretext, in order "to find narcotics activity going on."<sup>113</sup> The defendants argued that since the

---

vantage point from which to see the defendant.

107. See *id.* at 9. The search netted a bag of cocaine base, a loose rock of cocaine base that Whren tried to hide in a secret compartment in the passenger door, and two tin foils of marijuana laced with PCP.

108. See *Whren*, 53 F.3d at 372. A federal grand jury returned a four count indictment. It charged the defendants with the following: Count 1, Possession with intent to distribute 50 grams or more of cocaine base, or crack in violation of 21 U.S.C. §§ 841 (a)(1) and 841 (b)(1)(a)(iii); Count 2, Possession with intent to distribute cocaine base within 1,000 feet of a school in violation of 21 U.S.C. § 860 (a); Count 3, Possession of a controlled substance (marijuana) in violation of 21 U.S.C. § 844 (a); Count 4, Possession of a controlled substance (PCP) in violation of 21 U.S.C. § 844 (a).

109. See *Whren*, 53 F.3d at 372.

110. See *Brief for Petitioner*, *supra* note 99, at 5.

111. See *id.* at 7.

Officer Soto explained, "the only circumstances that I would issue tickets—I'm a vice investigator; I'm not out there to give tickets—is for just reckless, reckless driving, something that in my personal view would somehow endanger the safety of anybody who's walking around the street or even the occupants of a vehicle, maybe children or whoever . . . I wasn't going to issue a ticket to him at all. That was not my intention at all. My intention was to pull him over and talk to him." Officer Soto also acknowledged that his job duties as a vice officer is "out there almost strictly to do drug investigations." In fact, he testified that he pulls people over for traffic infractions "not very often at all."

This statement by Officer Soto indicates that he was not complying with his regular police procedures because the D.C. police procedures do not usually allow officers to stop people for warnings.

112. See *id.*

113. *Id.*

stop was a pretext, it was unconstitutional, and the court should suppress the evidence.<sup>114</sup>

The district court denied the defendant's motion to suppress, "concluding that 'the facts of the stop were not controverted,' and '[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop.'"<sup>115</sup> The defendants were found guilty of all four counts.<sup>116</sup> Michael Whren was sentenced to 168 months in prison, a term of supervised release, and a fine of \$8,800.<sup>117</sup> James Brown was sentenced to 168 months in prison and a term of supervised release.<sup>118</sup>

### C. The Court of Appeals

On appeal, the defendants argued that the "would have" standard was superior to the "could have" standard because the "would have" standard reveals the police practice of pulling people over for violations that "reasonable officers would generally ignore."<sup>119</sup> However, the Court of Appeals for the District of Columbia held that the subjective intent of a police officer is immaterial. So long as the occupants of the automobile were acting in a manner that a reasonable officer "could have" made the stop, the stop is constitutional.<sup>120</sup>

In so holding, the court adopted the "could have" standard, stating two justifications. First, the "could have" standard eliminates the need for courts to "inquire into an officer's subjective state of mind."<sup>121</sup> As such, the standard properly aligns itself with the Fourth Amendment's requirement of an "objective assessment of the officers' actions[.]"<sup>122</sup> Second, the "could have" standard guards

---

114. *Whren*, 53 F.3d at 372.

115. *Id.* at 373.

116. *See id.*

117. *See id.* The Court sentenced Whren to the following on January 26, 1994: Count 1: 168 months incarceration and five years supervised release. Count 2: 168 months incarceration and ten years supervised release. Counts 3 & 4: one year incarceration and one year supervised release. All sentences were to be served concurrently. Whren was assessed the following fines: \$8,800 on each count, all fines to be concurrent with count two, and a special assessment of \$150.

Brown was sentenced to the following on February 9, 1994: Count 1: 168 months incarceration and ten years supervised release. Count 2: 168 months incarceration and five years supervised release. Counts 3 & 4: one year imprisonment and one year supervised release. All sentences were to be served concurrently. Brown was assessed the following fine: \$150 special assessment.

118. *See id.*

119. Brief for Petitioner, *supra* note 99, at 11.

120. *See Whren*, 53 F.3d at 375.

121. *Id.*

122. *Id.*



against police abuse of power because it requires the police officer to have probable cause or reasonable suspicion that the traffic infraction occurred.<sup>123</sup>

The D.C. Circuit's decision is significant because it adopted the same standard for determining pretext stops used by a majority of the other circuits. In 1995, after it joined the majority, the number of circuits using the "could have" standard was eight, those using the "would have" test was three.<sup>124</sup>

#### D. The Supreme Court

Following the D.C. Circuit's decision, the Supreme Court granted certiorari to Michael Whren and James Brown.<sup>125</sup> In a unanimous opinion, the Supreme Court resolved the conflict among the circuit courts by holding that the "could have" standard is the proper standard to determine whether a stop is a pretext.<sup>126</sup> Justice Scalia authored the opinion, stating that the "would have" standard is "plainly and indisputably driven by subjective considerations."<sup>127</sup> Therefore, because Fourth Amendment jurisprudence is based on objective assessments and standards, the "would have" standard is inappropriate.

In so holding, Justice Scalia made six points. First, under the Fourth Amendment, the police "decision to stop an automobile is reasonable so long as they have probable cause to believe that an infraction has occurred."<sup>128</sup> Recall that to determine whether a police action amounting to a search or seizure is reasonable, the court balances the level of intrusion into a person's right to privacy against the government's interests.<sup>129</sup> However, when an officer has probable cause to believe that a crime or traffic infraction has occurred, the probable cause itself satisfies the balancing test, except in extraordinary circumstances.<sup>130</sup> The existence of probable cause automatically

---

123. See *id.* at 376. "[T]he 'could have' test provides a principled limitation on abuse of power. Officers cannot make a traffic stop unless they have probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts—requirements which restrain police behavior."

124. See *supra* note 90.

125. See *Whren*, 116 S. Ct. 1769.

126. See *id.*

127. *Id.* at 1774.

128. *Id.* at 1772.

129. See *Macon*, 472 U.S. at 468-469; *Prouse*, 440 U.S. at 653-654.

130. See *Whren*, 116 S. Ct. 1769.

equals reasonableness.<sup>131</sup> If a search or seizure is reasonable, it does not violate the Fourth Amendment.<sup>132</sup>

Second, the constitutionality of a traffic stop does not turn on the subjective intent of the police officer.<sup>133</sup> Third, the "would have" test is actually a subjective test, cloaked in objective terms.<sup>134</sup> Justice Scalia points out that although the second prong of the "would have" standard is based on a "reasonable police officer," it still requires an assessment of his subjective intent.<sup>135</sup>

Fourth, although the Fourth Amendment actually requires a "balancing of all relevant factors," this case does not require a balancing test, because even if the officers deviated from normal procedures they had probable cause to believe the defendants committed a traffic infraction.<sup>136</sup> Because the officers had probable cause to stop the defendants, the probable cause outweighs the defendant's privacy interests in avoiding police contact.<sup>137</sup>

Fifth, the "would have" standard would force courts to exercise "virtual subjectivity"—"speculating about the hypothetical reaction of

---

131. See *id.* at 1777.

132. See *id.*

133. See *id.* at 1774. "Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." Justice Scalia referred to several cases to support this point: "Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Id.* Justice Scalia points specifically to *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). In note 3, the court "flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification." Justice Scalia also referenced *United States v. Robinson*, 414 U.S. 218 (1973) where they held that "a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search[.]'"

134. See *Whren*, 116 S. Ct. at 1774. The defendants "insist that the standard they have put forward—whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given—is an 'objective' one. But although framed in empirical terms, this approach is plainly and indisputable driven by subjective considerations." *Id.* Justice Scalia apparently sees the "would have" test as subjective because the standard still asks a subjective question: "whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind." *Id.*

135. See *id.* at 1774-75.

136. See *id.* at 1775.

137. See *id.* at 1776. Basically, Justice Scalia states that where you have probable cause, you do not need to balance. There are rare exceptions to this rule: if the police action is conducted in an "extraordinary manner, unusually harmful to an individual's privacy." *Id.* The court uses the example of *Tennessee v. Garner*, 471 U.S. 1 (1985), where a young black male was shot in the back by a police officer as the boy was trying to scale a fence. A woman had reported a prowler in her home. The responding police searching around the back side of the house, saw the defendant run across the yard. The officer, although he testified that he did not believe the defendant was armed, shot the defendant pursuant to Tennessee's "Fleeing Felony Statute." See TENN. CODE. ANN. § 40-7-108 (1982).

a hypothetical constable."<sup>138</sup> Essentially, Justice Scalia is referring to the flaw inherent in the "would have" standard: what is the standard to determine what actions a "reasonable" police officer would take.<sup>139</sup>

The sixth point effectively lays the "would have" standard to rest by invalidating the second prong of the standard. Justice Scalia concludes that, "it is a leap from the proposition that following regular procedures is some evidence of lack of pretext to the proposition that failure to follow regular procedures proves . . . pretext."<sup>140</sup> Because the "would have" standard fails, Justice Scalia considers the "could have" standard as the obvious choice because it complies with the textual requirement of the Fourth Amendment by asking the magic question: did the officers have *any* probable cause sufficient to justify the stop?<sup>141</sup>

Justice Scalia appears to be mostly concerned with the subjective flavor of the "would have" standard and the fact that courts would have to engage in an exercise known as "virtual subjectivity."<sup>142</sup> However, this "virtual subjectivity" reasoning has no force.<sup>143</sup> Under the "would have" standard the court is required only to make the initial determination of probable cause with reference to the police procedure manual.<sup>144</sup> If the police officer is complying with standard operating procedures, and has probable cause, there is no pretext.<sup>145</sup> This type of inquiry is hardly the horrible game of speculating about the hypothetical constable that Justice Scalia posits. In fact, requiring compliance with police practices will allow clever policy makers, who

---

138. *Whren*, 116 S. Ct. at 1775.

139. *See id.*

140. *Id.* The court, in so stating, referenced the fact that police practices would be too tenuous for any trial court judge to "practicably assess" and that police practices differ or "vary from place to place and from time to time." *Id.* As such, it would not be practicable for a standard to turn on whether a police officer varied from standard procedures. Although beyond the scope of this paper, it is interesting to note that following "regular practices" are relied upon by the courts in many different contexts. For example, in the Administrative Law context, it has been held that before an agency can terminate a potential beneficiary's entitlement, the agency must comply with its own internal procedures. *Morton v. Ruiz*, 415 U.S. 199 (1974). Arguably, there exist many other areas of law that require strict compliance with regular procedures. In the context of criminal law, where the stakes for the accused are so high, it would not impose too great of a hardship for police to follow standard operation procedures.

141. *See Whren*, 116 S. Ct. at 1775-1776. "For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure." *Id.* at 1777.

142. *See id.* at 1776.

143. *See LaFave, Controlling Discretion by Administrative Regulations*, *supra* note 29.

144. *See Chapin*, 75 Wash. App. at 468, 879 P.2d at 305.

145. *See id.*

draft the police regulations, to write regulations that will allow all police officers to make minor traffic stops.<sup>146</sup>

This problem has been addressed by Professor LaFave, who has long supported a pretext doctrine that comports with the "would have" standard.<sup>147</sup> Professor LaFave notes that unchecked police discretion is a major concern throughout Fourth Amendment jurisprudence.<sup>148</sup> He contends that explicit, written, police policies and procedures are essential in the area of the police and their "fourth amendment activities."<sup>149</sup> Because the police officer's discretion is largely invisible to the public, the police officer's discretion is largely insulated from public scrutiny as well as "judicial oversight."<sup>150</sup> The key to a meaningful check on police power thus rests with effective police procedures. "A process of police rulemaking makes it possible for the experience and expertise of the entire [police] department to be focused upon the matter at issue and more effectively communicated to the reviewing court."<sup>151</sup> Therefore, when a defendant challenges a police action in court, the judge, in assessing the relevant police procedure in question, "could promote a dialogue with the police by affording the law-enforcement agency an opportunity to justify and explain the practice at issue, thereby focusing judicial review upon the legality and propriety of the department policies rather than the actions of an individual officer."<sup>152</sup> Although Justice Scalia asserts that the "would have" standard is merely a subjective test cloaked in objective clothing, in fact it is not. The "would have" standard is objective when undertaken in the manner Professor LaFave proposes.

Under the LaFave approach, the "would have" standard is a win-win situation. The prosecutor can combat a defendant's bogus pretext challenge to evidence by proving compliance with police procedures, while the defendant remains protected by a probable cause requirement as the framers of the Bill of Rights intended. Under the "could have" standard, however, there is no such protection for the defendant. There exists an opportunity for judicial review, but the review is artificial because as Professor LaFave notes, it takes very little "to

---

146. See generally LaFave, *Controlling Discretion by Administrative Regulations*, *supra* note 29.

147. See *id.*

148. See *id.* at 501.

149. *Id.* at 446.

150. *Id.* at 448.

151. See *id.* at 450.

152. *Id.*

supply grounds for a traffic stop [that are] acceptable to the courts."<sup>153</sup>

The Dateline NBC television exposé dramatically revealed the need for a pretext stop doctrine with bite, and highlighted the flaw in Justice Scalia's reasoning. Police officers can easily obtain probable cause to justify a traffic stop. As Dateline NBC proved in the Louisiana exposé, once the officer has probable cause, the officer, cloaked in his probable cause shield, has free rein to search the vehicle, make arrests, and impound the vehicle and its contents. These actions are constitutional under the *Whren* holding.<sup>154</sup> Justice Scalia might argue that the practice of the Louisiana officer was unconstitutional because the officer did not have probable cause for the infraction; thus the stop was a "fabricated" pretext stop and unconstitutional.<sup>155</sup> Although technically this is correct, it is pragmatically wrong because in conducting traffic stops, police officers can easily satisfy probable cause, and the officer's discretion is largely invisible to the public.<sup>156</sup> Consequently, probable cause is illusory. That probable cause is an illusion is clear from the Dateline NBC exposé, which demonstrates Professor LaFave's concern regarding unchecked police discretion and supports the need for the "would have" standard: probable cause is no security at all, especially if there are no hidden cameras to protect the citizen.

The preceding sections have outlined the basics of search and seizure, discussed the pretext doctrine, analyzed the *Whren* decision, and questioned the reasoning of Justice Scalia's opinion. However, the citizens of Washington state can rest more easily because the *Whren* decision need not apply to Washington if the Washington courts follow the trend they have established in other areas of the state's search and seizure law.

This next section undertakes an independent state constitutional analysis to demonstrate that Article 1, Section 7, of the Washington State Constitution provides broader protection to Washington citizens than does the Fourth Amendment.

---

153. See KAMISAR ET AL., *supra* note 70, at 24.

154. See *Whren*, 116 S. Ct. 1769.

155. See *id.*

156. See LaFave, *Controlling Discretion by Administrative Regulations*, *supra* note 29.

#### IV. WHY WHREN WILL NOT APPLY TO WASHINGTON STATE

Traditionally, the United States Constitution provides at least a minimal level of protection for its citizens. But state courts, under their own constitutions, can provide their citizens with broader protections than the parallel provisions of the federal constitution.<sup>157</sup> The Fourth Amendment protects citizens from unreasonable searches and seizures. However, courts have interpreted Article 1, Section 7, of the Washington State Constitution as focusing not on the "subjective privacy expectations" of citizens, but rather on "those privacy interests which the citizens of [Washington] [s]tate have held, and should be entitled to hold, safe from governmental trespass absent a warrant."<sup>158</sup>

Because Article 1, Section 7, focuses on the objective privacy interests of Washington citizens, the state constitution provides a greater protection of privacy, including in the area of pretext stops, than does the Fourth Amendment to the U.S. Constitution.<sup>159</sup> Therefore, Washington courts should continue to apply the "would have" standard in determining whether a stop is a pretext.

Analyzing whether Article 1, Section 7, provides Washington state citizens greater protection from pretext stops than the Fourth Amendment involves a three-part test.<sup>160</sup> The first prong is an examination of the six factors announced in *State v. Gunwall* to determine whether the state constitution does provide broader

---

157. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975). See also *California v. Greenwood*, 486 U.S. 35 (1988). For an excellent history of the "rebirth of state constitutional law," see Linda White Atkins, *Recent Developments: Federalism, Uniformity, and the State Constitution—State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986), 62 WASH. L. REV. 569 (1987).

158. *State v. Boland*, 115 Wash. 2d 571, 577, 800 P.2d 1112, 1115 (1990) (quoting *State v. Myrick*, 102 Wash. 2d 506, 510-11, 688 P.2d 151, 154 (1984)).

Washington State Constitution Article 1, Section 7, states: "No person shall be disturbed in their private affairs, or their home invaded, without authority of law." WASH. CONST. Art 1, §7. Article 1, section 7, provides two distinct areas of protection: protection in one's home, and protection in one's private affairs. For purposes of this comment, only the latter area of protection is considered.

159. Though not an exclusive list, Washington courts have interpreted Article 1, Section 7 to provide broader protection in the following areas: *State v. Boland*, 115 Wash. 2d 571, 800 P.2d 1112 (1990) (right to privacy in one's trash); *State v. Butterworth*, 48 Wash. App. 152, 737 P.2d 1297, review denied, 109 Wash. 2d 1004 (1987) (unlisted phone number and address); *In re Rosier*, 105 Wash. 2d 606, 717 P.2d 1353 (1986) (electric consumption records); *State v. Boyce*, 44 Wash. App. 724, 723 P.2d 28 (1986) (canine sniffs); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980) (automatic standing).

160. See *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986).

protection and whether the state constitution automatically applies to every case in which it is raised.<sup>161</sup>

Factor one considers the language of the state constitution to determine whether the state constitution would mandate a different decision than the federal constitution.<sup>162</sup> Factor two queries whether significant differences exist in the texts of the parallel provisions of the state and federal constitutions.<sup>163</sup> A significant difference may "warrant reliance" on the state constitution.<sup>164</sup> Factor three evaluates the state constitutional and common law history to determine whether the state constitution was intended to provide broader protection than the federal constitution.<sup>165</sup> Factor four considers the pre-existing state law to determine whether the state law is "responsive to concerns of its citizens . . . ."<sup>166</sup> Factor five assesses the differences in structure between the federal and state constitutions.<sup>167</sup> This factor focuses on the difference between enumerated powers in the federal constitution and the guarantee of rights under the state constitution.<sup>168</sup> The sixth and final factor determines whether the particular area of law is a matter best suited for national uniformity or whether it is a matter of state interest and local concern.<sup>169</sup>

The *Gunwall* analysis appears daunting at first blush, but it is actually less complicated in the area of searches and seizures than in other areas. Due to the prior applications of Article 1, Section 7, to other areas of search and seizure, the Washington courts have previously considered and adopted factors one, two, three, and five.<sup>170</sup> As such, factors one, two, three, and five are already established and need no further analysis because in the area of search and

---

161. *Id.* at 58, 720 P.2d at 811.

162. *See id.* at 61, 720 P.2d at 812.

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.* at 61-62, 720 P.2d at 812.

167. *See id.* at 62, 720 P.2d at 812.

168. *See id.* at 59.

169. *See id.* at 62, 720 P.2d at 813.

170. *See State v. Boland*, 115 Wash. 2d 571, 576, 800 P.2d 1112, 1114 (1990). When comparing "the same constitutional provisions as those to be examined [in the instant case], we adopt its [*Gunwall*'s] analysis of the first, second, third, and fifth factors and examine only the fourth and sixth factors as they apply to this particular case."

seizure these factors remain largely constant.<sup>171</sup> Only factors four and six require analysis since these are case specific inquiries.<sup>172</sup>

Once factors four and six are met, the second prong of the overall three-part test requires discussion of the appropriateness of an independent state constitutional analysis.<sup>173</sup> This part of the analysis asks why, in the area of pretext stops, the Washington state constitution provides more protection of a citizen's privacy than does the Fourth Amendment.<sup>174</sup> The third prong of the analysis identifies the appropriate standard to determine whether a stop is pretext and thus violates Article 1, Section 7, of the Washington State Constitution.<sup>175</sup>

#### A. Factor Four: Pre-Existing State Law

Pre-existing state law reveals that Washington state has adopted the "would have" standard, and rejected the "could have" standard now promulgated by the U.S. Supreme Court in *Whren*.<sup>176</sup> According to the Washington Court of Appeals in *State v. Chapin*, a stop is not a pretext under the "would have" standard if a reasonable officer would have made the "stop in the absence of an improper purpose."<sup>177</sup> To determine the actions of a "reasonable officer," the court considers the "circumstances surrounding the stop, including whether the officer was following standard procedures or routine practices."<sup>178</sup>

---

171. See *State v. Young*, 123 Wash. 2d 173, 867 P.2d 593 (1994); *State v. Chrisman*, 100 Wash. 2d 814, 676 P.2d 419 (1984); *State v. White*, 97 Wash. 2d 92, 640 P.2d 1061 (1982); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980).

172. See *State v. Johnson*, 75 Wash. App. 692, 702, 879 P.2d 984, 990 (1994).

173. See *id.*

174. See *id.*

175. See *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986).

176. See *Whren*, 116 S. Ct. 1769.

177. *State v. Chapin*, 75 Wash. App. 460, 468, 879 P.2d 300, 305 (1994). In a more recent Washington case, Division I of the Court of Appeals in *State v. Blumenthal*, 78 Wash. App. 82, 85-86, 895 P.2d 430 (1995), cited *Chapin* as authority in evaluating whether the defendant's constitutional rights were violated by a pretext stop. Interestingly, the only issue before the *Blumenthal* court was "whether the pretext rule should be interpreted more broadly under article 1, section 7 . . . than under the Fourth Amendment." Without applying the proper *Gunwall* analysis, the court could "not discern any reason why the ["would have" standard] should be interpreted differently under article 1, section 7, than under the Fourth Amendment." Essentially, the *Blumenthal* court did not decide the Washington state constitutional question. They did, however, follow *Chapin*. The *Blumenthal* and *Chapin* decisions reveal that pre-existing state law should "bear on the granting of distinctive state constitutional rights." *Chapin*, 75 Wash. App. at 468, 879 P.2d at 305 (1994) (citing *U.S. v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988)).

178. *Chapin*, 75 Wash. App. at 468, 879 P.2d at 305.



In *Chapin*, the defendant was driving a pick-up truck and pulled out from behind an abandoned gas station.<sup>179</sup> A police officer saw the defendant, followed him for a distance, and observed that his rear license plate was in the cab window of the truck instead of being properly mounted on the bumper.<sup>180</sup> The officer pulled Chapin over, noticed he was not wearing his seat belt, asked Chapin for identification, and discovered that Chapin had outstanding warrants.<sup>181</sup> The officer arrested Chapin.<sup>182</sup> When the officer searched the truck, he recovered a pager, open containers of alcohol, marijuana, drug paraphernalia, and a wallet with approximately \$1,100.<sup>183</sup>

Although the officer admitted that his primary purpose for stopping Chapin was to learn what he was doing behind the abandoned gas station, the court did not find that the stop was a pretext.<sup>184</sup> The court primarily based its decision on the fact that the officer was complying with standard procedures and practices.<sup>185</sup> The officer was on routine road patrol, and his duties included enforcing traffic infractions. He testified that it was a routine practice to run warrant checks when investigating a traffic infraction.<sup>186</sup> The court noted that "there was nothing to suggest that [the officer] departed from normal procedures in making the stop."<sup>187</sup> Therefore, since he was following standard procedures, the stop was not a pretext because a reasonable officer would have made the stop even in the absence of an improper purpose.<sup>188</sup>

The *Chapin* court expressly dismissed the "could have" standard because "it extinguishes the [pretext] rule."<sup>189</sup> Pre-existing Washington law indicates that an independent state constitutional analysis is appropriate in light of *Whren's* application of the "could have" standard, which is exactly the standard the *Chapin* court sought to avoid.<sup>190</sup>

---

179. See *id.* at 462, 879 P.2d at 301.

180. See *id.*

181. See *id.*

182. See *id.*

183. See *id.*

184. See *id.* at 468, 879 P.2d at 305.

185. See *id.*

186. See *id.*

187. *Id.*

188. See *id.*

189. *Id.* at 467, 879 P.2d at 304.

190. See *id.*

B. *Factor Six: Are Pretext Stops A Subject Matter of State Interest or Local Concern?*

Under this factor, the relevant inquiry is whether pretext stops are a matter of state interest or whether this subject is one suited for national uniformity.<sup>191</sup> If pretext stops are a matter not suited to national uniformity, then a state constitutional analysis is appropriate.<sup>192</sup> To answer this inquiry, it is necessary to consider the objective of national uniformity and whether this objective is "outweighed . . . by overwhelming state policy considerations to the contrary."<sup>193</sup>

While not expressly stated, the court in *Chapin* indicated that the area of pretext stops is of particular state interest and local concern. The *Chapin* court rejected the "could have" standard because the "could have" standard, effectively extinguishes the pretext rule—as long as the police officer is acting within his lawful power, there is no pretext.<sup>194</sup> Furthermore, under the "could have" standard, there exists no "basis for judicial review of an officer's use of the discretionary power to stop so long as the stop has a lawful basis."<sup>195</sup> So stating, the court implicitly established the following state policy: a pretext rule should not pay mere lip service to the protection of Washington State citizens.<sup>196</sup>

Therefore, the "would have" standard is the only way to deter the police from abusing their lawful authority by ensuring that there exists meaningful judicial review.<sup>197</sup> The state policy of protecting Washington State citizens by checking police discretionary powers was of such local concern that the *Chapin* court declined to follow the majority of federal circuits in using the "could have" standard.<sup>198</sup> Therefore, pretext stops are a matter of particular state interest and local concern, and thus, the sixth *Gunwall* factor is satisfied.<sup>199</sup>

---

191. See *Gunwall*, 106 Wash. 2d at 59, 720 P.2d at 811.

192. See *id.*

193. *Id.* at 67, 720 P.2d at 815.

194. See *Chapin*, 75 Wash. App. at 467, 879 P.2d at 304.

195. *Id.*

196. The *Chapin* court stated: "Under a pure objective approach, there can logically be no pretextual stops because, where the officer is acting lawfully, his or her actions are defined as objectively reasonable. We reject this approach because it extinguishes the rule. Second, under a pure objective approach, there is no basis for judicial review of an officer's use of the discretionary power to stop so long as the stop has a lawful basis." *Id.*

197. See *id.* at 467-69, 879 P.2d at 304-305.

198. See *id.*

199. See generally *State v. Johnson*, 128 Wash. 2d 431, 446, 909 P.2d 293, 302 (1996). (holding that Factor six is met in Article 1, Section 7, cases: "Petitioner correctly recognizes that privacy interests are matters of particular state interest and local concern.").

*Gunwall* factors four and six indicate that an independent state constitutional analysis is appropriate. The next section undertakes the second prong of the independent state constitutional analysis: the privacy consideration.

### C. *The Privacy Consideration*

Article 1, Section 7, protects persons from being "disturbed in their private affairs," or their homes invaded, "without authority of law."<sup>200</sup> Under Article 1, Section 7, the court determines a violation of a person's privacy expectations according to whether the state unreasonably intruded into the defendant's private affairs.<sup>201</sup> What constitutes a "private affair" is defined by "those privacy interests that the citizens of Washington state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."<sup>202</sup>

In order to determine whether the citizens of Washington state have a legitimate privacy interest in being free from pretext stops requires discussion of the textual language of Article 1, Section 7, and a comparison of the text to the ramifications of the doctrine of pretext stops.

It could be argued from a policy perspective that extinguishing a meaningful pretext stop doctrine serves a valuable purpose: it allows good police officers, who are concerned with the well being of the populace as a whole, to get villains and drugs off of our streets. So viewed, the pretext stop doctrine serves only the guilty by allowing the evidence against them to be inadmissible.<sup>203</sup> The pretext stop doctrine does not protect the privacy of a grandmother driving an olive Dodge Dart, going 45 m.p.h. It does not protect the midlevel manager, driving his Jeep Cherokee, equipped with ski racks, and a "My Kid Is An Honor Student At Washington Elementary" bumper sticker. Or does it?

In 1987, Justice Scalia authored the majority opinion in *Arizona v. Hicks*.<sup>204</sup> In *Hicks*, a police officer entered an apartment from which a bullet had been fired.<sup>205</sup> Inside the apartment, the police officer noticed expensive stereo equipment that looked out of place.<sup>206</sup> The officer discovered that some of the equipment was stolen when he

---

200. See WASH. CONST. art. 1, § 7.

201. See *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980).

202. *Johnson*, 128 Wash. 2d at 446, 909 P.2d at 302.

203. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

204. 480 U.S. 321 (1987).

205. See *Hicks*, 480 U.S. at 323.

206. See *id.*

called his dispatch with the equipment's serial numbers.<sup>207</sup> The officer eventually seized the equipment.<sup>208</sup>

In his opinion, Justice Scalia found that the officer did not have probable cause to search the premises or seize the equipment.<sup>209</sup> Therefore, the search and seizure violated the Fourth Amendment.<sup>210</sup> In dismissing the dissent's arguments, Justice Scalia supported his view by stating, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."<sup>211</sup> Admittedly, the "insulation" Justice Scalia was referring to was probable cause, which the officer did not have.<sup>212</sup> Because the officer did not have probable cause, his actions were unconstitutional, and the protections of the Fourth Amendment were triggered.

But consider Justice Scalia's *Hicks* opinion in light of the *Chapin* court's fears regarding the "could have" standard. In the words of Judge Agid, "The entire purpose of the pretext rule is to deter police from using their *lawful* authority to detain a person for a minor offense in order to investigate or search for evidence of a more serious offense."<sup>213</sup> Assuming that Judge Agid is correct about the true purpose of the pretext rule, Justice Scalia's statement about the Constitution insulating the criminality of a few, establishes the privacy element needed for the independent state constitutional analysis. The U.S. Constitution intervenes only in order to protect the citizens from unlawful abuses of police authority (an officer fabricating a traffic stop without probable cause), while Washington courts have found a privacy interest for Washington citizens in being free from abuses of lawful police authority.

The preceding section has established factors four and six of the *Gunwall* analysis as well as a valid privacy interest. The third part of the independent state constitutional analysis demonstrates that the "would have" standard is appropriate under Article 1, Section 7, of the Washington State Constitution.

---

207. *See id.*

208. *See id.* at 323-24.

209. *See id.* at 325.

210. *See id.*

211. *Id.* at 329.

212. *See id.*

213. *State v. Chapin*, 75 Wash. App. 460, 467, 879 P.2d 300, 304 (1994).

D. *Leaving Well Enough Alone: The "Would Have" Standard Works*

The appropriate standard for courts to apply to determine whether a stop is a pretext is the "would have" standard because it provides for a pretext doctrine that actually combats both unlawful abuses of police authority as well as abuses of lawful police authority.<sup>214</sup> The "would have" standard allows for protections on both sides: it allows for more than the illusory reliance on probable cause to protect Washington citizens from unfettered police discretion by providing for meaningful judicial review of police officer's actions.<sup>215</sup> Also, the "would have" standard gives prosecutors ammunition to combat a defendant's pretext challenge to evidence obtained via probable cause if the police officer was following standard police procedure.<sup>216</sup>

Thus, the "would have" standard is appropriate under Article 1, Section 7, of the Washington State Constitution; coupled with the six nonexclusive *Gunwall* factors, the independent state constitutional analysis is satisfied. The next section applies the "would have" standard to the *Whren* facts to predict the possible future treatment of pretext stops in Washington.

E. *Was Whren A Pretext Stop Under Article 1, Section 7?*

Under Article 1, Section 7, of the Washington State Constitution and the "would have" standard, the *Whren* case would have had a different outcome. Recall that the *Chapin* court is not concerned with the police officer's subjective motivation.<sup>217</sup> It determined whether a stop was a pretext by looking at the circumstances surrounding the stop, including "whether the officer was following standard procedures or routine practices in effecting [the] stop."<sup>218</sup>

In the *Whren* case, the vice officers were patrolling a "high drug area" in an unmarked car.<sup>219</sup> The officers determined that they wanted to stop the defendants for traffic violations.<sup>220</sup> The Washing-

---

214. See *id.*

215. See *id.*

216. See LaFave, *Controlling Discretion by Administrative Regulations*, *supra* note 29.

217. See *Chapin*, 75 Wash. App. at 466, 879 P.2d at 304.

218. *Id.* at 468, 879 P.2d at 305.

219. See *Whren*, 116 S. Ct. at 1772.

220. The court found the officers had probable cause to stop the defendants for the following traffic offenses: 18 D.C. Municipal Regulation § 2213.4 (1995) ("An operator shall . . . give full time and attention to the operation of the vehicle"); § 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal"); § 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions."); *Whren*, 116 S. Ct. at

ton, D.C., Metropolitan Police Department regulations generally prohibit plainclothes police officers or officers in unmarked vehicles from giving traffic tickets.<sup>221</sup> The regulations also prohibit the officers from giving oral warnings, by allowing oral warnings only under "extreme circumstances."<sup>222</sup> Accordingly, Officer Soto testified that the only time he would issue a ticket was for reckless driving, and that he stopped people for traffic violations "[n]ot very often at all."<sup>223</sup>

The surrounding circumstances reveal that the vice officers were seriously deviating from department procedures. Also, it was highly unlikely that a reasonable plainclothes vice officer would have pulled the defendants over absent an improper motive. This case is distinguishable from *Chapin*, where the officers were performing their regular duties, and following regular police procedure.<sup>224</sup> Therefore, under Article 1, Section 7, the stop in *Whren* would be a pretext stop, where the officers used their lawful authority in hopes of finding a more serious offense.

## V. CONCLUSION

Washington courts, in many areas of search and seizure, have found broader protection for Washington state citizens under the Washington Constitution than under the Fourth Amendment. The U.S. Supreme Court's *Whren* decision, while technically complying with the text of the Fourth Amendment's requirement for probable cause, ignores the protections that probable cause was intended to provide. Because *Whren* effectively overrules the doctrine of pretext stops and requires the toothless "could have" standard, Washington courts should continue to provide Washington citizens with the protection of the "would have" standard.

---

1772.

221. Metropolitan Police Department Washington, D.C., General Order 303.1 pt. 1, Objectives and Policies (A)(2)(4) (April 30, 1992) states: Members who are not in uniform or are in unmarked vehicles may take [traffic] enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.

222. Metropolitan Police Department Washington, D.C., General Order 303.1 pt. 1, objectives and policies, (A)(Z)(5a) (April 30, 1992), which states: in each instance of a stop for a traffic violation, the member shall:

- (1) Issue either a Notice of Infraction (NOI); or
- (2) Issue a Warning Notice of Infraction; or
- (3) Under extreme circumstances an oral warning may be given (e.g., receipt of a radio assignment requiring immediate response, or the motorist was enroute to a hospital for emergency treatment of a sick or injured passenger).

223. Brief for Petitioner, *supra* note 102, at 7.

224. See *Chapin*, 75 Wash. App. at 468, 879 P.2d at 305.